EA-87-02

Ontario

ENVIRONMENTAL ASSESSMENT BOARD

VOLUME: 403

DATE: Wednesday, October 28, 1992

BEFORE:

A. KOVEN Chairman

E. MARTEL Member

FOR HEARING UPDATES CALL (COLLECT CALLS ACCEPTED) (416)963-1249

FARR & ASSOCIATES REPORTING INC.

(416) 482-3277

2300 Yonge St., Suite 709, Toronto, Canada M4P 1E4

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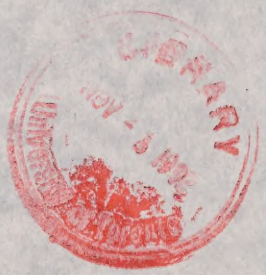

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HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental Assessment for Timber Management on Crown Lands in Ontario;

- and -

IN THE MATTER of a Notice by The Honourable Jim Bradley, Minister of the Environment, requiring the Environmental Assessment Board to hold a hearing with respect to a Class Environmental Assessment (No. NR-AA-30) of an undertaking by the Ministry of Natural Resources for the activity of Timber Management on Crown Lands in Ontario.

Hearing held at the Civic Square, Council Chambers, 200 Brady Street, Sudbury, Ontario on Wednesday, October 28, 1992, commencing at 9:00 a.m.

VOLUME 403

BEFORE:

MRS. ANNE KOVEN	Chairman
MR. ELIE MARTEL	Member

APPEARANCES

MR. V. FREIDIN, Q.C. MS. C. BLASTORAH MS. K. MURPHY	MINISTRY OF NATURAL RESOURCES
MR. B. CAMPBELL MS. J. SEABORN MS. N. GILLESPIE	MINISTRY OF ENVIRONMENT
MR. R. TUER, Q.C. MR. R. COSMAN MS. E. CRONK MR. P.R. CASSIDY MR. D. HUNT	ONTARIO FOREST INDUSTRY ASSOCIATION and ONTARIO LUMBER MANUFACTURERS' ASSOCIATION
MR. R. BERAM	ENVIRONMENTAL ASSESSMENT BOARD
MR. J.E. HANNA DR. T. QUINNEY MR. D. O'LEARY	ONTARIO FEDERATION OF ANGLERS & HUNTERS
MR. D. HUNTER MR. M. BAEDER	NISHNAWBE-ASKI NATION and WINDIGO TRIBAL COUNCIL
MS. M. SWENARCHUK MR. R. LINDGREN	FORESTS FOR TOMORROW
MR. D. COLBORNE MR. G. KAKEWAY	GRAND COUNCIL TREATY #3
MR. J. IRWIN	ONTARIO METIS & ABORIGINAL ASSOCIATION
MS. M. HALL	KIMBERLY-CLARK OF CANADA LIMITED and SPRUCE FALLS POWER & PAPER COMPANY

APPEARANCES (Cont'd):

MR. R. COTTON	BOISE CASCADE OF CANADA LTD.
MR. Y. GERVAIS) MR. R. BARNES)	ONTARIO TRAPPERS ASSOCIATION
MR. P. ZYLBERBERG) MS. B. LLOYD)	NORTHWATCH COALITION
MR. J.W. ERICKSON, Q.C.) MR. B. BABCOCK)	RED LAKE-EAR FALLS JOINT MUNICIPAL COMMITTEE
MR. D. SCOTT) MR. J.S. TAYLOR)	NORTHWESTERN ONTARIO ASSOCIATED CHAMBERS OF COMMERCE
MR. J.W. HARBELL	GREAT LAKES FOREST
MR. S.M. MAKUCH	CANADIAN PACIFIC FOREST PRODUCTS LTD.
MR. D. CURTIS) MR. J. EBBS)	ONTARIO PROFESSIONAL FORESTERS ASSOCIATION
MR. D. KING	VENTURE TOURISM ASSOCIATION OF ONTARIO
MR. H. GRAHAM	CANADIAN INSTITUTE OF FORESTRY (CENTRAL ONTARIO SECTION)
MR. G.J. KINLIN	DEPARTMENT OF JUSTICE
MR. S.J. STEPINAC	MINISTRY OF NORTHERN DEVELOPMENT & MINES
MR. M. COATES	ONTARIO FORESTRY ASSOCIATION
MR. P. ODORIZZI	BEARDMORE-LAKE NIPIGON WATCHDOG SOCIETY

APPEARANCES (Cont'd):

MR. R.L. AXFORD	CANADIAN ASSOCIATION OF SINGLE INDUSTRY TOWNS
MR. M.O. EDWARDS	FORT FRANCES CHAMBER OF COMMERCE
MR. P.D. McCUTCHEON	GEORGE NIXON
MR. C. BRUNETTA	NORTHWESTERN ONTARIO TOURISM ASSOCIATION

INDEX OF PROCEEDINGS

---Upon commencing at 9:00 a.m.

MADAM CHAIR: Good morning, Mr. Hunter.

MR. HUNTER: Good morning.

MADAM CHAIR: Mr. McKibbon.

MR. McKibbon: Good morning.

MADAM CHAIR: The Board is ready to hear your final argument, so please get started.

ARGUMENT BY MR. HUNTER:

Thank you. Before I begin, I would like to thank Ms. Koven, Mr. Martel, for your patience over the last few years. I know that - I'm not sure that enjoyed is the right word - but I certainly have benefitted from participating in this exercise. I won't speak for my client, they expressed their views to you in Sioux Lookout. Mr. Cheechoo, Mr. Cromarty, Mr. Fox and many other members expressed their interest in the participation in this exercise and their hope that all would be well.

I'm only going to take a few moments of your time. I don't see any need to repeat what you have in the final argument, that would be of little benefit to you and to the other parties.

Our final argument was submitted to you several months ago and in that regard I want to make it clear, I believe you have a letter on file from Mr.

MacKay which I simply want to read into the record.

"Mr. Bentley...", this is addressed to Bentley Cheechoo:

> "Further to our phone conversation this morning I want to inform you that our legal counsel has presented our position to the Timber Class Assessment Board. We have consulted and informed our communities about these hearings, particularly New Slate Falls, Saugeen, Cat Lake First Nation who are affected within the area of the undertaking."

And I think one of the points we should all clearly understand is that this Class Environmental Assessment applies only to a portion of NAN, Nishnawbe-Aski Nation, and that essentially it is that portion south of the Albany River or the 50th parallel, and that it is our understanding that the terms and conditions of this Class EA shall not apply north of that area. And that was the agreement reached quite a while back, and I want that on the record to clarify any potential misunderstandings.

As you are aware, and this is as a result of the submissions of our final argument, agreements were reached between NAN and Mr. Wildman which would

allow for the continued negotiation north of that area and that will be done, as I understand it - and I am not a party to that - pursuant to the Memorandum Understanding and pursuant to whatever direction the Crown, Province of Ontario and the communities take, and I have nothing that I can say further on that matter. We have the Ministerial commitment to proceed to deal in that area.

There was other correspondence which is also on file that deals with specific matters, one of them dealing with access north of the Albany. The northern communities had requested access, MNR was unable to meet their requirements until an exemption order was negotiated under the Environmental Assessment Act, and I understand that there are some communities doing that and some aren't.

The client I represent, NAN, through their Grand Chief, Mr. McKay. Windigo Tribal Council instructed me to give you their best wishes and to simply request from you that this Board order terms and conditions according to the principles set out in the Environmental Assessment Board Exhibit 1957 which is entitled: Statement of Agreement Concerning Principles for Terms and Conditions which are found in the document Draft Terms and Conditions submitted by the

Ministry of Natural Resources. And as we have indicated in our argument, the terms and conditions as described meet the principles as stated in our request to this Board.

I must stress, I'd like to deal with one issue which goes to the question of sufficiency. I think I'm required to indicate to the Board why I think you should accept these terms and conditions. Let me at the outset make one point very clear in order to perhaps avoid any controversy.

These terms and conditions were requested by my client to apply within NAN and the Windigo Tribal Council areas. It was not our gift to say that they should apply anywhere else or they should not apply anywhere else. If because of an omission of the latter meaning that we said they should not apply anywhere else, it was inferred that they ought to apply in other areas, and there's very little I can say about that. From the rational point of view it's not our gift to say where something should or should not apply. And, in that context, I want to clarify another point.

While these are NAN and Windigo's terms and conditions in the sense that they were representative in presenting it to this Board, they are in reality the communities' terms and conditions. I

want to make that point absolutely clear. The decision as to whether or not these terms and conditions apply is at the community level.

That is found in our document, it's found in the document that MNR has presented, and I believe it's found at 7(b) and the essence of it is very clear. Ministry of Natural Resources is obligated to follow an alternative process with respect to timber management planning if the community chooses that route. Some will, some won't.

The purpose of the exercise right from the first day was to come up with a process that hopefully would benefit the aboriginal community; no more, no less, and that was the purpose for our participation.

And, again, I want to make the point, as I understand my client, if a community wishes to follow these particular procedures, then that's their decision. It is not Windigo's gift to either -- as an entity to accept or reject that alternative. Their purpose was to simply provide options and alternatives for the local communities and it's their decision.

With that in mind I would respectfully ask the Board to adopt the principles in the terms and conditions as outlined in the proponent's terms and

conditions and to do so because there is more than sufficient evidence on the record for the Board to so adopt them.

There's a little bit of ambiguity in Mr. Colborne's comments to this Board in the transcript of September 24th, 1992, sufficient ambiguity in the sense that someone might at some point in time say there was not sufficient evidence for NAN's position.

I don't think that was intended, but in an abundance of caution I would ask this Board to indicate that on the record, based on the submissions made to this Board and the statement of evidence of panel 5, but more importantly in terms of the evidence presented to you by the elders, by the community members, by Mr. Cheechoo Mr. Cromarty, Mr. Fox, Mr. McKay, that those individuals stated to you clearly without ambiguity their support for this proposition.

Further, you had the evidence of Mr. McKibbon who I think should be accepted as a planning expert. He provided planning evidence in support of the position of the community. You're bound by respectfully the evidence before you, you have that, you have no alternative evidence as to either another system or the insufficiency of this system.

Let me be the first to say that it's not

perfect but it is simply a first step, and I think as indicated by all of the people with whom you've met, these procedures are simply seen as laying the foundation and the bedrock for hopefully future and much more direct involvement in resource management in northern Ontario. It's an administrative procedure and it is seen by my clients as being no more and no less than that.

You also have before you evidence of participation in agreement between the Ontario forest industry and the Ministry of Natural Resources and our clients. I think it is fair to say that it is very hard to cobble agreements together these days and when they're done and they are done voluntarily without duress, they ought to be respected. This Board asked us to negotiate and we did, and I would respectfully request that they respect the outcome of that process as between those parties.

We live in times where it is very easy to destroy institutions, destroy agreements and read into those documents things that were never intended and problems that can never be resolved. So we move in small steps, and that is what this is.

The perspective that my clients have taken to this - and I will come to this in my final

comments - is not one of seeking protection for rights. Those issues will be dealt with in other forums and through other means and, in that regard, the perspective of my client is to facilitate their participation in resource development and to ensure more than adequate protection for the communities and for the environment.

We deliberately chose not to get into a standard-setting exercise, not to get into a slugging match over science or the lack of science. What we chose to do was trust to a process which would allow aboriginal participation and the ability to bring those issues to fore on the local level.

The reason for that is very simple: Those communities are the ones who will be truly affected by forestry activity with respect to their very ability to work and live in those community areas, and that was the focus of the concern, and they are of the view that as a first step these procedures provide the ability to advance those issues.

The guarantee that those objectives will be met can only be ensured through the effective involvement of the community and the reality of the participation of the Ontario forest industry and their willingness and obviously the commitment of the

Ministry of Natural Resources to affect the proper management of these terms and conditions. And obviously we presume and trust that they will do so.

If it proves to be otherwise, then so be it and other presumably steps will be taken. But that is not the focus or intent of these hearings. The intent was to come up with a positive method of getting on with life.

I think it's important that these comments be made, that the Board, Ms. Koven and Mr. Martel, you feel comfortable with your decision and not feel any ambiguity with respect to these terms and conditions. And so, respectfully, I would ask you to be bound, if you like - I don't want to get formal - by the evidence before you and to go beyond that to more important issues of respecting the process that was engaged in by the parties in good faith and yet even go beyond that and remember the comments and opinions and the views that were given to you by the participants in Sioux Lookout well over a year ago, and that obviously is the most important consideration of all.

My final comments go to the issues with respect to treaty. If I might, I would refer you to the comments of Mr. Fox, and these are found in the first page of our final argument, there were others

that made. In fact, Ms. Koven you may recall the first day of our participation some many years ago Mr. Fox at that time, in his position as Deputy Grand Chief, spoke to the Board and articulated the views of why we were here, a decision not lightly taken and one which was not universally shared over the course of the hearing because it reflected a commitment and degree of participation that was not comfortable for everybody, and that was known and that was stated and Mr. Fox said that:

> "We are here not to speak to the Board about self-government rights, the rights which we believe are inherent...", propitious words, "...because of the simple fact that we were here first. We are not here to speak about our treaty or aboriginal rights, we are here to participate in a quasi-judicial forum whose decisions will shape the future of timber forestry activities in northern Ontario."

I'm under very strict direction. Other parties will appear before you and may seek orders from this Board that would affect treaty rights, or argument will be presented to you that because of their

perception of legal obligations under treaty that you can make orders which affect MNR's activities in this area. I must state as clearly as possible, my client does not want and respectfully pleads with you not to make any orders or directions which could be interpreted as affecting treaty rights with respect to NAN or Windigo.

There are issues of jurisdiction which are important but, more importantly, both NAN and those communities are in the process of determining how they wish to pursue those issues, whether at a political level and/or possibly at a court level to seek resolution of what "their rights are".

What is very important in this regard is that Treaty 9 was signed as between the Crown in right of the Dominion, the federal government and the Province of Ontario, and the fundamental legal status or legal character of their treaty, in their view, is yet undetermined and those issues are yet to be worked out.

So, in conclusion, we would request that the Board order the terms and conditions as identified, the principles as identified in our final argument, and if the Board is prepared to make orders which incorporate into those orders determinations as to the

status of any treaty, that it be clearly stated by the Board that such orders do not apply to nor take into consideration the Grand Council Treaty 9 and the document entitled James Bay Treaty No. 9.

I made one omission, I draw it to your attention. I'm sure you're aware, but again simply for the record, I did not refer to the OFIA's incorporation of the agreement which is found I understand at page 32, item 5, and I suppose it's subparagraph No. 91, the NAN agreement 91 and 92 of their argument.

Thank you. Those are my comments.

MADAM CHAIR: Thank you, Mr. Hunter. Mr. Martel and I don't have any questions, but we thank your clients very much for participating in the hearing and thank you for concluding your argument very quickly. Thank you.

MR. HUNTER: Thank you. Thank you, fellow counsel. We generally behaved with civilities and I appreciate that.

MADAM CHAIR: Mr. Colborne, do you want to have a break before we begin hearing your argument?

MR. COLBORNE: All I need is time to move my papers. I can do that either now or after a very short break.

MADAM CHAIR: Pardon me, Mr. Colborne?

MR. COLBORNE: All I need is time to move my papers, so I can either do that now or we can take a very short break.

MADAM CHAIR: That's fine. You aren't scheduled to begin until after the lunch hour. It's entirely up to you as to when you want to start today.

MR. COLBORNE: I've been on notice that Mr. Hunter might not require the entire morning and so I've been prepared to begin, and I would like to begin because my estimate of time is such that we may very well be able to conclude today if I start now.

MADAM CHAIR: All right. Why don't we take a 15-minute break then, Mr. Colborne. Thank you.

---Recess at 9:30 a.m.

---On resuming at 9:55 a.m.

MADAM CHAIR: Good morning, Mr. Colborne. Glad you could show up today and we are ready to hear your final argument. Please get started.

ARGUMENT BY MR. COLBORNE:

Good morning, Madam Chair, Mr. Martel. It's my pleasure and privilege to be here again.

I want to introduce the people who are here with me. Sitting to my left is Chief George Kakeway. You first met him in 1988 I believe. Chief Kakeway is the member of the Grand Council Treaty No. 3

organization who has had the mandate, as it were, to deal with this particular matter of Treaty 3's representation before this Board in this hearing from the beginning.

He is the representative of my client who presented the opening address. He is the individual to whom I have turned throughout this process to obtain instructions in all matters and, in some cases where these matters involved difficult and deep questions of policy, it was necessary to go to all of the Chiefs in the Treaty 3 organization, but he's basically the one who gave me the instructions that I received.

I should also tell you that he's been Chief of his own First Nation for something like 17 years and he is hoping to get back to Kenora because he's going to be awarded something by the local Chamber of Commerce tomorrow, so his interests are certainly broad enough and his accomplishments to cover much more than what we're dealing with here.

I'm glad that he could be here though because it's very important that whatever is said here actually get communicated back to the organization that I represent and to the status Indian communities in the Treaty 3 area and I know that he can do that.

I'm also assisted today by Teresa

Schilling, who you may have met over the past few days. She's an articling student who has agreed to help me with some of the paperwork associated with this presentation.

You know that my client's primary concerns from the beginning have been two: One is treaty and aboriginal rights, the second is allocation questions and, particularly, allocation of the timber resource to aboriginal communities in the Treaty 3 territory. These primary concerns have been asserted right from the very beginning. When Chief Kakeway was here in May of 1988 he said, and I can quote a few words out of the presentation, he said:

> "We will be focusing on two types of issues...", he said, "...the first will be forest management practices and whether they are in accordance with honouring Treaty rights."
>
> And the second one he mentioned was:
>
> "Why the jobs and profits from the forest never remain in our communities."

And for purposes of my submissions today I'm going to shorten my reference to those two subjects down to referring to the first as the Treaty rights issue and the second as the allocation issue.

And I'll stress now, and I think I'm going to be repeating myself on this, that I'm only talking about my client's treaty rights. Independent governments can have different perspectives, there can be certainly different types of treaties, rights under treaties and so on, so I cannot say anything about the treaty rights of any party other than my clients and the evidence that I will be referring to that was presented by and on behalf of my client, I assure you, was also intended only to refer to treaty rights that impacted in their territory; in other words, they were not talking about anybody else's treaty rights, and I don't think we even ever pretended to qualify any witness to talk about anybody else's treaty rights because it's well known, I believe, that from one treaty to another the rights questions are not identical at all.

In any case, there have been sqsquirmishes over the years before this Board about the treaty rights question and I was rather surprised that it did not appear on the list of the Board's issues that was released on July 2nd, particularly since it was not only a primary concern of my client but also it was my understanding of the evidence and the earlier submissions that it was a primary concern

of OMAA.

So we have two full-time parties who've been saying since day one that treaty rights is an issue, or at least for OMAA it would be treaty and aboriginal rights, and it wasn't even on the list. So I feel that I have to work my way through it a little bit here today and I hope to satisfy you that it's something that ought to have been on the list and I'm hoping it will be on your list of matters to consider by the time you've heard all the submissions and by the time you sit down to actually render and fashion your decision.

MADAM CHAIR: Mr. Colborne, you have to turn off your microphone or can you hear me with it on. Oh, you can keep it on then.

I just want to clarify your understanding about what the list is that you are referring to. I think the letter that accompanied a list of issues that are of interest to the Board made it very clear that there is no importance attached to any of those issues. There are many other issues in addition to treaty rights and allocation matters that obviously are of great importance to the Board that didn't find their way on to that list.

The sorts of matters that we identified

on the list were questions that we wanted to hear some argument about, where we weren't satisfied perhaps that we had all the information that we wanted, but the reason we didn't identify your concerns, I think, is that we have heard a great deal of evidence and we knew you would be addressing these very appropriately in argument.

So there was nothing exclusive about the list with respect to what the Board thinks are the important issues at this hearing.

Yes, Mr. Martel reminds me, since day one at this hearing we have had your commitment that you would be addressing these matters in great detail in argument and we've been relying on you to do that.

MR. MARTEL: We didn't have to put it on the list.

MR. COLBORNE: Thank you for that comment, Mr. Martel, because I indeed have been saying we can't settle it in the course of hearing evidence, we're going to have to leave it to argument, and Mr. Freidin's been saying the same thing. So here I am and today's the day, as the old joke goes.

The significance of putting it before this hearing, from my client's point of view, is that this hearing may in some ways be a one-shot

opportunity. There may never be another hearing like this for a hundred years. There may never be the degree of expertise and evidence focused on forest and timber issues as has been focused before this Board over the last four years. And given the amount of wood that you know about being taken out of the territory in the area of the undertaking - but I will talk only really about the Treaty 3 territory - in some ways this may be my client's last and best opportunity to get some expert and highly informed attention to the treaty right concern.

And I'll be speaking more on the legal question of jurisdiction and so on, but I wanted to begin with that sort of factual observation, that never before has there been in one place before one tribunal so much expertise about the very factual questions which lie behind the legal issues.

I want to remind you of some of the factual part of my client's evidence, and I won't repeat what's in the written materials which have been filed, but I do want to highlight some of it. Most of the evidence that my clients gave over that period of time in 1990-1991 in Kenora and Fort Frances had to do with allocation. There were a lot of things that they talked about, but I would suggest to you that mainly,

if you had to put a label on it, it had to do with allocation.

And I would suggest that my clients, although many of them -- or, excuse me, my witnesses,, although many of them had no previous experience with presenting evidence before a formal hearing, drew very vivid pictures of the communities that they came from and the situations that they faced. Some of them were the elected Chiefs, some of them were asked to attend by the elected Chiefs. They were all quite familiar and very deeply based in their home communities, and I'm suggesting that I don't have to really remind you of the picture that they were painting.

And the picture is a rather bleak one in many ways in terms of - and I will use the term very broadly - allocation. My evidence showed a very successful Ojibway economy in the past, probably more economically thriving than the economies that our ancestors laboured under in those times, the early 19th century was some of the period covered by the evidence, but when we came to the 20th century we could see that the economy was destroyed, this previous economy was destroyed and the Ojibway people had to take various measures, they moved from one kind of work, one kind of activity, one kind of resource activity to another, but

various things happened, sometimes intentionally sometimes not, they kept getting thrown out of one area, moving to another area, gradually everything was downhill step by step from a thriving traditional economy to, as a number of the witnesses said, now we're all on welfare. Not all on welfare, a lot of welfare.

The common theme of response to this over the years, according to the historical witnesses, was for the Ojibways to say, honor our treaty rights and we will be okay. But the response to that in some cases went so far as, in the words of Mr. Holzkamm, to say you're being subversive here, you're going a way too far and, in many cases, people were dragged through the courts, they were prosecuted for trying to exercise hunting, fishing rights and so on. And only through a very gradual process was this effort to treat their rights as being non-existent only very gradually was it pushed back, and my clients see that process of pushing back as still taking place today.

All of this occurs of course within a real world economic context, and one of the things that my witnesses observed was the reality of the non-Indian population moving in and exploiting a resource and then moving out. And that's what, from the point of view of

the permanent communities, that is the Ojibway communities in that territory, that's the reality. The non-Indian population is there to make a dollar from the resources and when the dollars are gone they're gone.

I noted, and I don't know if there's an exhibit number that has been assigned to this, but very recently, October 8th, 1992 the proponent updated its statistical exhibits and I took a look at the population projections, these are the latest population projections and I'm sure that Mr. Freidin will correct me in his reply if I'm wrong, but I did this arithmetic by long division myself, so I hope it's right.

But I see that the northwestern Ontario population, as a percentage of the Ontario population, in 1971 was 2.9 per cent; in 1991 it climbed to 2.5 per cent; in 2011 anticipated to be 2.2 per cent.

When I left Thunder Bay they had just announced the closing of another mill. The non-Indian population that is supported by that pulp mill is not going to stay in Thunder Bay, they will move on to, as my witness Frances Kavanaugh said, greener pastures. Abitibi-Price is closing that mill, they're closing it for financial reasons, there's no question about that. They will take their investment and they will put it

somewhere else.

Whereas the people who will be staying there are the Ojibway people. They're on reserve, a large portion of them and, as you were told, and I think it's very clear in the evidence and nothing contradicted this, the reserve forests are small, they're poor and they're damaged. There is a desire across the board, maybe not in all communities, less so in some more so in others, but there's a desire across the board to get benefits from the forest industry and get these benefits flowing into the Indian communities, but problems, obstacles were identified and these appear to be very serious. I'll just mention some that appeared.

I don't think though that one can take the sum of the evidence and conclude exactly what the obstacles are. I don't think you really have enough before you. So all these represent I think are just examples.

But some of them were: Small allocations, some of them were -- and I think you'll remember Mr. Carpenter from Lac Seul saying, we put in for a district cutting licence and we started in position 29 or something, now we've moved up to position 17 in 10 years; unacknowledged discrimination.

You heard Chief Wilson talk about Boise Cascade having "an Indian price" and a "Indian price" for wood delivered at the mill I think he was talking about, or perhaps it was for the sale of the hardwoods that they use in their sawmill operation. He said that if he didn't have non-Indian he thought they would have been out of business.

There was mention of the bureaucratization of the process, and I suggest to you that if one thing has become very clear in the course of this hearing it's that the Ministry of Natural Resources, the proponent, is highly competent in what would be termed the field of bureaucracy, and I'm not using it necessarily in a derogatory sense, but in the sense of a public administration apparatus being able to turn everything into paper rules and to split hairs a thousand different ways. It may be necessary for what the proponent does, I'm not saying it is or it isn't, but I do suggest that it's certainly there and very daunting for people who do not come from a written English language tradition.

The jobs question. I suggest that it's quite clear in the evidence, and there was even some update on this I think in response to the Board's queries, that there are very, very few Indians working

for MNR, and given the history of certainly the Ojibways in the Treaty 3 territory, forest people who lived and thrived off the product of the forest, to have the public apparatus that now manages that forest as practically a pure white operation is just utterly inappropriate and shockingly wrong.

I was in the Kenora MNR office last Friday and all around me were white male employees. That's just the reality of it. Similarly with the Industry, there are not very many - I think the evidence is quite clear on this - there are not very many Indians working in the forest industry off reserve for non-Indian employers. I'm going to be saying more about this, but I want to stress at this time that when I make these observations based on the evidence, I'm not alleging any intentional discrimination either by MNR or by the Industry, but I am saying that the facts are so overwhelmingly obvious that it doesn't really matter whether it's intentional or not, I don't think it is to tell you the truth, but the reality is there and ought to be dealt with.

I will also be addressing the question, I'll just say a word about it right now, about whether you can do that. I'm not here saying this Board is going to solve the ills of the north, but I will be

saying that this subject is an allocation issue and I will be urging you to be consistent with your decision of I think it was January, 1990 in which you said that allocation was an issue, that you would be hearing evidence on and making decisions concerning and I know that you have some serious decisions to make in terms of how far that goes, but I'm urging you to say that it does go as far as to say that the Ojibway people from these forest communities ought to have some allocation benefits from this resource and that that is within your jurisdiction to deal with.

The reason why my clients can come before you and make these submissions is not simply because they live there but, more than that, because we say that they have rights in the territory, and these may be rights that give the proponent a great deal of consternation, but they're rights nevertheless and I will be saying more about that in a minute.

But if my client were only, for example, the residents of small rural communities in the north I wouldn't be able to say that, I would be unable to come before you and say that, I would have to be making moral and political submissions on their behalf, I would have to be saying that it's unfair that they're excluded. I'm not saying that to you on behalf of our

clients, I'm saying it's illegal that they're excluded.

The impacts of forestry practices on trapping, wild rice, fishing and so on are aptly dealt with in the evidence of many witnesses, and I won't remind you of that, I'll just give you some references though so they will be on the record in case you want to refresh your memory.

In the proponent's final argument, Chapter 1.11 at pages 179. The impact of forestry operations on fishing is mentioned, at 183 the impact on trapping is mentioned, at 189 the impact on wild rice harvesting is mentioned.

Now, the context in which these matters are mentioned in the proponent's argument are somewhat, I would say, laboured efforts to say that cutting down a forest is really not causing much impact on these other resources, but I leave it to you to assess whether you ought to agree and there has been some conflicting evidence on that as to the amounts of impact in each case.

And I won't be taking you through the somewhat conflicting evidence on that, but I will say that you have seen areas that have been cut and my clients have certainly seen areas that have been cut and, at least from my client's point of view, it's just

a sight to behold to see what has actually happened on the ground and then to read what the proponent says the impact is.

And the suggestion that it is so minor and even in some ways positive is really quite incomprehensible to many of the witnesses at least who I called. In any case, it's not essential for my position that the impact, for instance, of forestry on fishing is a lot or a little bit, the only thing that's essential is that there be some impact.

I want to remind you briefly of what Dr. Poole said, just two points from his evidence. He said that for there to be progress when you have an allocation issue involving aboriginal people on one side and un-aboriginal governments on the other side, nations, states and other types of European style governments, what you need in order to make any progress is some kind of agreement. It just doesn't work very well if it's merely casual, undefined, uncontrolled discussions, nothing gets anywhere, nothing is ever resolved, you need some kind of agreement in place, and he mentioned things like land claim agreements.

He also said that very often opposition to this type of agreement being made is based on the

fact that the people who are at the table to make the agreement are either directly or indirectly subject to losing their jobs as a result. And to my mind, without getting too technical about it, this is a real conflict of interest situation. You've got the proponent is a large apparatus that is in many ways the elite in the small towns of the north, and I've lived in several of them. If you have a job with MNR you're the one who's got the new four-by-four, you're the one who's got the big pay cheque from the government every month, you're the one who's got all kinds of power and it's recognized as power, it's almost as good as working for the OPP. These people are not --

MR. FREIDIN: Mr. Colborne, from time to time you go on and explain your experiences in these towns and your perception of who works in the MNR offices. I think you're going into the area of giving evidence.

MR. COLBORNE: I quite agree with Mr. Freidin, I cannot give evidence here.

I was hoping that my comments would be so general in nature that they wouldn't be controversial but I'll try to make them more general, and so I'll discontinue my comments about the small town elites and continue with why the Ministry of Natural Resources,

the proponent here, may not be the appropriate party to be making these allocation decisions when some of them, if made in a certain way, could actually result in, to use Dr. Poole's evidence, loss of jobs.

I want to remind you as well about at least one point made by the economists who testified on behalf of Grand Council Treaty 3. One of the points they made, which I think was very powerful, was that in the year 2000, according to their projections, one quarter of all new labour force entrants in the Treaty 3 area would be status Indian.

So although one can say, and you have the evidence from other parties that status Indians represent a small proportion of the entire population of Ontario in some areas, and certainly large areas of the undertaking status Indians represent a very significant part of the population and a very quickly growing part.

So the prospect of one quarter of all new labour force entrants being status Indians and status Indians having very little benefit accruing to them from participation in the forest industry is a difficult one that, in my submission, in light of your very broad jurisdiction, ought to be addressed in your decision.

My clients gave their evidence as to how they view this and they said very clearly, we don't want affirmative action, we don't want you or anybody else to go around saying that you've got to hire Indian, my clients say that that's not a good idea.

There are a number of other traditional approaches, the old social problem of approach, you throw some money at it and you make some jobs for a year or two. That kind of thing is utterly unacceptable as well.

Their position is, and they're trying to stick to a long tradition of their own here, great consistency over the decades, in fact over the centuries, great consistency in saying, just conduct yourself - this is when they're speaking to MNR here - just conduct yourself in accordance with honouring our rights and we will not have a problem. And that has always been met with silence and deflection and that is probably the reason why my clients are here before you saying, we want you to deal with it in a very limited fashion, and it may be the reason, for example, why Mr. Hunter's clients don't feel that it's necessary to do that.

In fact, I looked at the evidence presented by Mr. Hunter's client and I saw the words of

the then Grand Chief of his client saying, we're satisfied with the commitments we have from the Ministry of Natural Resources and I believe that evidence, my client's utterly respect that evidence. They may not have the same problem, my clients do have a problem.

They tried to say that it must be dealt with by reason of something compulsory - and, as you know, I'll get to what I'm saying this Board should order in a moment - but the reason why it has to be compulsory is partly because of the proponent's attitude. I tried to include in my written materials some reflection of the condescending and dismissive attitude towards Indian rights that pervades the proponent's evidence.

Another reality is the conflict of interest, to use the term very broadly. I've already said something about that. And, finally, another reality is that the track record in terms of Treaty 3 and Ontario coming to any satisfactory conclusion on anything is practically nil and has not changed in the four and a half years that this hearing has been underway.

That's all I wanted to say about the factual background that is pertinent to my legal

argument, and I would try to summarize it by saying that you can't paper over with a lot of commentary the reality, and this is the reality, that the Treaty 3 communities are effectively excluded from the benefits of the forest industry. There may be exceptions, there may be reasons, there may be two-foot pile of explanations, but the reality underlying all that is what we have to get to and the real reality is that there is that exclusion. So what does one do about it.

I want now to turn to the more legal parts of my submission. And I'll stress at the beginning by saying, again, that I have never been here asking this Board to decide what the treaty rights of my client are. I quite agree when Mr. Freidin says it's not for this Board to hear evidence and to decide, yes, this is part of the treaty right and that is not part of the treaty right, that's simply not being presented to you, I'm making no request of that nature.

Similarly, when I talk about the other main point of our argument, that is the allocation point, I'm not asking you to preside over any allocation questions. Allocation questions are the kind of nuts and bolts detailed thing that certainly does not have to be dealt with in the grand forum of this hearing, you would be here forever.

That's what I'm not asking you to decide. But I want proceed to describe what I'm asking you to decide.

I'm asking you to, as you know, impose negotiations, to make them compulsory and to make them proceed on the basis of good faith, and I'm trying to comprehend what the objection to that is from the proponent.

MR. MARTEL: Can I ask you a question?

MR. COLBORNE: Certainly.

MR. MARTEL: Because maybe that's why you get the -- what's that really mean, to impose negotiations. We can say to MNR as part of the Ts & Cs you must negotiate. Now, what's that really mean. Does that mean allocation, does that mean -- I mean, that's as difficult to get one's head around as to precisely what it is you're asking that should be negotiated, and how do you make that work?

And maybe you could help me. I put the question in as you started, I didn't want to interfere, but some clarification would be helpful.

MR. COLBORNE: Yes. Maybe I can short circuit my reply to that by simply saying that it's the type of thing that can be taken to court. Courts are not unfamiliar with dealing with allegations by parties

that negotiations are not proceeding in good faith. This is a subject which arises in the labour relations field, it's not a daily occurrence, but it's certainly not an unusual occurrence where a party comes before a court and says: I'm the plaintiff, the defendant is obligated by an enforceable order of some kind or a statute to negotiate in good faith. Here's the record, here's what we did, here's what they did, we say that's not good faith. Courts deal with that.

And that's why, if you choose to impose that condition, it would permit my clients to say to the proponent: Okay, let's start negotiating and we are obligated, both of us, to proceed in good faith, but if you don't proceed in good faith, if you walk away from the table and say: Well, we're simply not going to sit down with you this year, then my clients can go to court and say: Here, this is the order of the Environmental Assessment Board, it's a condition of the proponent's ability to continue with the forest management that they talk to us in good faith and here's the record. They haven't even come to the table for a year, for instance. Then a court would be able to say: Yes, that's not good faith, and the court could impose a remedy.

This way it never comes back before the

Environmental Assessment Board, your job is done. And also it would be quite unusual, I would think, for things to be in such a bad state that my clients would actually want to go to court, but it could happen, and I think you have evidence of some of these situations.

The fishing rights issue, where Ontario has simply refused to come to the table for four years. Now, if it's a purely voluntary situation, nothing can be done about that, or it's very difficult to do anything about it.

Negotiations are a consentual process ordinarily and if one party doesn't consent to be there then they just don't happen. And my clients are saying that in their experience whenever MNR gets faced with a difficult issue they run and hide.

And so we're asking for no more than an order that would not let them do that. This does not mean that these issues have to be resolved, because if my clients go to court with the record, they say: Here's what we said, here's what they said, that is not good faith, the courts may very well say: That's the best they could do and that's all they could do, and my clients would take their chances on that.

But I hope that explains why we've formulated it the way we have. We don't want to put

this Board in the position of having to try to define what the rights are and make lists and supervise it afterward and so on and so forth. But we are asking, given the evidence that you have, that you provide us with a lever that can be pulled at some future time if the situation warrants it, and if that lever is pulled it will not be this Board but it would probably be a court that decided whether in fact the term or condition that you imposed was being satisfied or not. It lights a fire under the bureaucracy. That's really the beginning and end of what it does.

Perhaps I will refer you to passages in the transcript which make this clear. I'll read them to you in a moment. But let me say that what I think this stands for is the following: That the proponent can have good will, particularly at the political level, but is faced with having to serve so many masters that as soon as the going gets tough the truck's off the road, and here's the way it goes.

I'll read from Volume 318 beginning at page 56305, and this is Madam Chair asking a question. I'll start partway through it. Just for the record, the entire transaction begins at 56302 but I'll jump forward to what I think is the core of it.

Madam Chair says:

"We went through a ruling two years ago where the Board made it very clear that Indian bands, Indian groups, OMAA, various groups did have a stake in timber management planning and were parties to this hearing, and the Board would look at issues of economic allocation and participation in timber.

You have argued as well that you don't want us making decisions about what are your rights and you don't want us makng those decisions about what your rights are.

I don't know if Mr. Freidin has anything to say with respect to what he is going to be arguing at the end of the day, but your concern is that you want to know what that argument is now."

Excuse me. I wonder if I could return to that after a break because I'm referring to this passage in answer to your question, Mr. Martel, and I think that there is a clearer reference but I would have to do a little bit of paper shuffling to find it. So if I could just go on now, thank you.

I was saying that -- I was asking myself:

What could be the objection to the remedy that we were requesting; that is, the objection from the proponent, and the objection seems to be phrased at times as a legal one, and this to me is quite remarkable because the position that my client advances is based on a constitutional right and I have a difficult time getting my legally trained mind around a Ministry of the Crown coming before a tribunal and saying, ignore a constitutional right and I want to say a fair bit about that.

I'm suggesting to you that these subjects may not be convenient to the proponent and certainly they're not, but to try to suggest that a constitutional right is something that is not before this tribunal or not to be dealt with is really, I suggest to you, completely unacceptable. And my submissions in this respect are based to a considerable extent on the proponent's own evidence.

You may have noticed in my written argument that Mr. Crystal in his evidence conveniently summarized the law. Section 35 has been in our constitution since 1982. I will be pointing out that for years there was a question of whether it meant anything or not, but since the Sparrow case, the Supreme Court of Canada says: Yes, it's not an empty

box, in fact it's a full box, and here's what it means and here's what you should do with it.

The proponent has made it clear that the question of whether or not my clients have treaty rights is not an issue here, it is agreed that they do.

And a moment ago I started reading from Volume 318 in response to Mr. Martel's question, but in fact now I'm clear that I was reading from the wrong passage in that context. What I was reading from is a passage that arises in the context that I'm now addressing. As I said, after the break I'll find the right part of the transcript.

Volume 318 page 56306 is where Mr. Freidin and I exchanged some comments on whether or not it is an issue here that Indians under Treaty 3 have treaty rights. And I submit that the record is quite clear that Mr. Freidin said: No, that's not an issue, we're not going to be arguing that you do not have treaty rights, and I don't think that in anything I've seen so far that Mr. Freidin has argued that Indians under Treaty 3 don't have treaty rights.

But I guess just to protect my position on all sides I will refer you to it. I think I can shorten up the actual submission by jumping ahead to page 56307 where I'm saying, beginning at line 12, or

excuse me 13:

"I'm glad to hear that Ontario is not taking the position here that my clients do not have treaty and aboriginal rights."

And that's in response to Mr. Freidin saying immediately above on the same page at line 1:

"It's my understanding that there will not be arguments that Mr. Colborne's clients do not have aboriginal and/or treaty rights."

There's other discussion in the same context, but it's on the basis of that position on the record by the counsel for the proponent that I am saying that that particular matter, that background issue is not an issue, there are rights, but the proponent is saying a number of things about them, including that they're undefined.

I want to refer you to one other portion of the transcript, and this is the one I was looking for a moment ago and, unfortunately, I picked up the wrong one. This is the one which I think demonstrates the fundamental problem that the proponent has in dealing directly with a party such as my client on questions of treaty rights, and I mentioned before it's

because they have a great number of other client interests that they must balance.

The exchange proceeds in this manner. This is cross-examination of Mr. Crystal by myself. Beginning on page 7995 at line 8, this is the conclusion of a question:

"Let me suggest this to you, that the authors of this report...", and the report that was before us at that time was the report of the Canadian Bar Association on treaty and aboriginal rights:

"...the authors of this report are saying in at least those two locations...", the context there is hunting, fishing and trapping:

"...when you get right down to things like hunting and fishing they have not only been fully accepted as items of right by the courts but have also been as the words appear on page 58 thoroughly examined and, therefore...", and Mr. Crystal comes in:

"A. ...thoroughly examined by courts; is that what you're saying?

"Q. I don't know. I'm just suggesting to you what the authors are saying here.

They should be taken out of that category of rights which are so totally undefined that nothing can be done about them until they were defined.

"A. I see.

"Q. Do you think that that may be what the authors here are saying, that we can't just say that everything that is preceded by the adjective Indian or aboriginal can be set to one side because we can say it has been undefined so we can ignore it for another 10 years? Aren't they saying that there are some things like hunting and fishing rights that have been accepted by the courts, they have been looked at 10 times over by a hundred branches of government and it is now time to do something about them?

"A. All right. Well, I think that I mentioned earlier the Government of Ontario at least is always involved when it's dealing with these issues in a process of balancing interests."

And then Mr. Crystal goes on to talk about the other interests that MNR has to take into

account. And I suggest to you that that's a fairly critical issue area where although there can be no doubt of the existence of the rights, MNR's mind turns immediately when presented with the question of what to do about those rights, turns its mind immediately to the other interests, well, what are we going to do about other people. And I think that's a very, a real crux of the issue here and why my clients need some protection of those rights.

I'll be pointing out in a moment that, at least in my view of the law, others may have a different view, but I'm not aware that there is a different view, other parties, certainly other parties before this hearing do not have consitutionally protected rights of the type that my clients have. So it's not a matter of balancing competing rights which are on the same level because the only parties before you, the only parties who could come before you with the consitutionally protected rights are those with the treaty and aboriginal rights.

Just to use an example, the Industry can't come before you and say that we have rights of that type, they simply do not.

Now, this question of undefined, I would suggest to you that if courts and tribunals were

expected to cut and run every time somebody said something was undefined they would have almost nothing to do. We've dealt with, I use the example in my written argument, things like clearcuts and tourism, very vague, undefined motions, but nobody has come before you and said: Well, just because it's undefined you have to ignore it.

And furthermore, of course, we don't accept that these rights questions are undefined. Our position is that if there's lack of definition it's mainly the responsibility of the proponent for reasons of ignoring them and abrogating them over more than a hundred years.

And we also say, to the extent that they are undefined, how are they going to be defined; is some rock going to fall out of the sky with the definition on it, no, they're going to be defined in negotiations or they're going to be defined in the dynamics of processes such as this, they're going to be defined when they're taken seriously.

Now, I was interested in the proponent's authority for saying that they were undefined, and here I was looking in Chapter 1.11 page 194 of the proponent's written argument, and the authority given there is footnote No. 92 on that page. And if one

looks at footnote 92 one only finds reference over to pages 164 to 182 of the proponent's witness statement No. 6. And if one looks at those pages in the proponent's witness statement No. 6, you find that they're largely taken up with Mr. Crystal's outline of some case law.

And I'll be saying in a moment that that case law has been almost entirely superceded by Supreme Court decision and I'm somewhat surprised that there has not been anything in the proponent's reply or in its argument acknowledging that most of those old cases, which were in fact current when Mr. Crystal was giving evidence, have simply gone by the board.

Supreme Court of Canada has now told us that Section 35 is a full box and here's what you do with it. I'll get to that in more detail in a moment.

So if that's the proponent's authority for saying treaty and aboriginal rights are so undefined, we can just sweep them under the rug, then you're looking at whatever they could put together in 1987 or so, and I at least insist that this tribunal has to look at Section 35 as it has now been interpreted by the Supreme Court of Canada.

One more point about this question of whether rights are undefined or not. I included in the

case book a reference to the Canadian Council of Churches case and there's an interesting passage in there which I thought was especially pertinent. If you just for the record I suppose, I'm not asking you to dig through the case now, but it is at Tab 4 of my collection of cases and authorities.

Here we had amendments to the Immigration Act and the plaintiff came forward with a number of submissions and one of the answers that the government gave is: Well, we don't even know what these mean yet, they're not even defined yet. And the court really gave very short shrift to that argument and said:

> "This argument must also fail. It's the constitutional validity of the legislation itself as the court interprets that legislation which is an issue, not the interpretation given to the statute by Immigration officials."

So if the proponent's officials have a hard time standing up and saying here exactly is what the treaty rights under Treaty 3 are, well that's completely irrelevant. What matters is whether they exist or not. And that is the basis upon which I'm asking for certain terms and conditions.

I also included in the case book a number

of court decisions having to do with the Canadian Charter of Rights and Freedoms. The section of the Constitution that deals with treaty rights, that is Section 35, does not fall within the Charter for various technical reasons, but it's my submission that the principles that one applies when dealing with any constitutional right, and this is applies to tribunals certainly as well as the courts, those principles are the same whether the right is in the Charter or not.

So I would really just say that by way of prefatory comments to make sure that you don't assume that perhaps they have no bearing on other parts of the Constitution.

I do think that it's correct that the way courts and tribunals are to deal with any part of the Constitution is also the way that courts and tribunals would deal with the Charter. And maybe I should discuss the question for a moment about whether tribunals deal with constitutional rights.

I included some passages from very current texts which I hope make it relatively clear, this is the Blake text at Tab 6, the Macaulay terms and conditions at Tab 13 that of course tribunals deal with constitutional rights, and I would have a hard time comprehending that they would not. There are lines

drawn, of course, and I'll get to those in a moment, but first on the assumption that constitutional rights are properly to be dealt with here.

Let me just say a few words about the principles that would apply, and you have the case references and I've highlighted passages in them if you want to refer to them. But they stand for some propositions which should be quite familiar: Like you don't take narrow and technical interpretations, you apply interpretations which give people their full rights, if you're interpreting a statute, that you apply principles that are in the Constitution - and that's the relevance of the Manitoba case at Tab 7 - Manitoba Council of Health Care Unions. There a tribunal looked at a statute and applied an interpretation which, in effect, perpetuated discrimination and the court said, if you have a choice you don't do that, if you have a choice in interpreting you, always go for the interpretation that will not offend the constitutional principle.

My suggestion would be that in looking at your extremely broad mandate under the Environmental Assessment Act there's no reason why you would need to interpret that mandate and your own statute in a narrow way or in a way that could be interpreted as permitting

continuation of a situation which was unconstitutional.

There are cases in my case book that say, if there's doubt, resolve it in favour of rights not against rights. There are cases which say rights can be infringed as much my omission as by commission.

If the Ministry of Natural Resources has come before you for four and a half years and presented a tonne of documents which virtually ignores Indian treaty rights everywhere and anywhere, then that omission ought to be the subject of some part of your decision as well. They don't have to come before you saying, we ignore treaty rights; if you merely see that they do, then you can act and you should act.

I included in the case book the Macaulay text, as I mentioned, at Tab 13 and here I thought was a very telling comment about the duty of tribunals to protect the public interest. Unlike a court, a court picks a winner or a loser, but Chairman Macaulay says:

> "In some cases you can say you're all losers or you can say you're all winners, but you don't have to make any black and white decision. The fundamental criteria is the public interest."

And I'm submitting to you that the public interest must be reflected in the Constitution of the

land, otherwise what does the Constitution mean.

I was careful to put into my case book the cases which I think are the Supreme Court of Canada cases on the very issue of whether you should deal with a constitutional question because it has arisen, it arose in relation to the Ontario Labour Relations Board particularly - I'll get into that in a moment - but I included the other cases too, I just put them all in there. I'm sure your counsel may be looking at them, I'm sure he's looked at them before I provided them. These are the cases that have to do with jurisdiction.

The Ontario Labour Relations Board in the Cuddy Chicks case looked at its own statute and said, this offends the Charter principle, so we're going to do such and such.

Naturally something this controversial went up through the court system, got to the Supreme Court of Canada and the Supreme Court of Canada said, yes, you can do that.

The other cases involve other tribunals and the trend of the cases, in fact I submit that it's quite overwhelming, is that tribunals certainly do have authority and ought to deal with questions of this type.

There are criteria listed, in fact

they've practically got it down to a checklist now. They say that if you have authority over the parties, and here I suggest you do have. Everybody with standing in relation to these matters had a thorough opportunity to come before you and have in fact been before you. I hope it's not going to be said that the Ministry of Natural Resources is not the Crown. I would say that that type of a submission would be the most extreme example of hair splitting.

The Ministry of Natural Resources is the emanation of the Crown in right of Ontario which has authority over land and resources and I can't imagine anybody else who could be before you more appropriate to deal with these issues. If Ontario created a Ministry of Forestry tomorrow, does that mean that everything you've done is out the window, of course, that's just nonsense.

That's the kind of unreality that people who don't get involved in legal proceedings of this type cringe from, that is such a bizarre departure from the actuality that one who is not a hair splitter can barely come to terms with. You do have the Crown before you, you do have the Indians before you, the parties are before you.

Subject matter, that's the other thing,

that's the second think that must be before you before you deal with a constitutional issue. The subject matter is the timber resource and, once again, it doesn't matter how you split hairs here, that is the subject matter.

The third thing that must be before you is authority in regard to the remedies sought, and I think in this context that must refer to the remedies that I'm asking for on behalf of my client since I don't think that any other parties, certainly not the proponent, is asking for a remedy that touches on the treaty rights issue, and the remedy that I'm seeking, as I've mentioned, is these compulsory negotiations. And I've referred in my argument, and I may return again to Section 14 of the Environmental Assessment Act, and I'm suggesting to you that you have ample authority in regard to the remedies sought.

So looking at that checklist, as it were, from this recent slate of Supreme Court cases dealing with the question of tribunals and constitutional rights, I submit to you that it's very clear that you do have the authority here to make the type of orders that I'm requesting.

This isn't a case where a complex legal question which is ordinarily reserved to the courts is

before you, I'm asking for a practical remedy that relates absolutely directly to what has been before you for four years and which can be dealt with effectively by the parties who are here before you.

I've mentioned the Sparrow case a few times. Up to a year ago if I was going to be here talking about my client's treaty rights I would have had to bring a box of cases, I would have had to bring the words of a thousands judges and try to make some sense out of them and, believe me, there are at least a thousand judges out there who are absolute experts on Indians and Indian rights and they did nothing but stumble over each other and contradict each other. So the law was a real mess.

Today I can shed that box of cases and I can come before you basically with not much more than the Sparrow case. The Supreme Court of Canada in that case utterly rejected the positions that had been taken by the Crown governments up to that time, and you'll see in the case report that the Crown in right of Ontario was there, all the provinces with "Indian rights problems", were all there, they were all arguing that Section 35 is an empty box, and if you think it's unfair for me to characterize it that way or perhaps Mr. Freidin does, because that's the phrase that

appears in Professor Morse's evidence which you have before you. For eight years from '82 to '90, lawyers on behalf of Crown governments were walking into courts saying Section 35 doesn't really have any content, it's undefined. Supreme Court of Canada in Sparrow finally utterly and completely rejected that.

And I guess I'm repeating myself, but this case came after MNR's evidence and they didn't put in any reply on it and they didn't put anything in their argument on this, they've left you with that messy pre-Sparrow case law which forms a part of their panel 6 evidence-in-chief from the year 1988.

Essentially those were parliamentary supremacy cases, it was judges saying - and right to the highest levels - well, it's too bad we breached these treaty rights but everybody knows this is a parliamentary system and parliament has the power. That's all that those cases were about.

But parliamentary supremacy is changed when a constitutional right is superimposed because then parliament cannot legislate to take away consitutionally protected rights except in certain ways. And so the whole game changed with the decision by the Supreme Court of Canada that Section 35 actually had content. So all these old parliamentary supremacy

cases are completely inconsequential now.

And in the Sparrow case I've marked some passages from it and I do invite you to read it. It is widely regarded as a landmark. I don't think you have to take my word for that. There are still some Crown lawyers going into courts across the country trying to minimize its impact, but with a fair lack of success, I would submit. Anyway, here are the passages I would like you to particularly look at. It's at Tab 19, and I think these passages are very brief so it may not be necessary for you to actually follow me through the book if you don't wish to.

But the case report series from which the copy is taken has numbers in the upper righthand and upper lefthand corners, so I'll refer to those numbers. The first appears at page 1092 and here the court is saying that the word dexisting, which is a highly controversial word in Section 35 of the Constitution, means unextinguished.

Up to the moment when this case came out it was still widely thought, and this thinking is reflected in the panel 6 evidence of the proponent from 1988, it was widely thought that existing meant not previously regulated and there is almost no such thing as an Indian right that had not been previously

regulated.

So the Crown was saying because the word existing, that section really doesn't have anything in it. The Supreme Court of Canada turned it all around and said: No, no, that just means unextinguished. And they said in other cases it's very, very difficult to establish that a right has been extinguished; it might be a regulated right, but not extinguished.

So the result of this was all of a sudden many, many rights - and we can use fishing just as an illustrative example which had been regulated to death - were still rights.

On the following page, 1093, there's another reference to existing towards the bottom of the page where the court says that these must be interpreted flexibly so as to permit their evolution over time. This was to overcome an argument that had been made in many courts and accepted in many courts that somehow rights had been frozen in 1982. If you could find one that hadn't been regulated, then whatever was there was absolutely frozen in 1982. And here the Supreme Court of Canada said: No, not the case, rights are flexible and they evolve over time just like anything else.

I want to go forward to page 1105 and

here the court said that Section 35, among other things, these are the words:

> "...provides a solid constitutional base upon which subsequent negotiations can take place. It affords aboriginal peoples constitutional protection against provincial legislative power."

This kind of observation by the highest court in the land is particularly important because it provides some direction that might otherwise not appear clear from the mere wording of a very short constitutional section, provides some guidance as to what can be done with it.

And I want to stress this reference to negotiations because that, as you know, fits in to the kind of relief that we're looking for here and we're saying that that's what it's based on. I'm not coming here saying, impose negotiations because the proponent is unfair, or impose negotiations because my clients are in need; I'm saying impose negotiations because Section 35 is part of the supreme law of the country and the highest court in the land has said that Section 35 is the basis upon which one can base negotiations.

I've marked another passage at page 1106, last paragraph on the page, just one sentence:

"When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded."

This I suppose repeats principles which can be found in many other places, but the idea is that if the rights are there they must be interpreted and applied in a broad and generous manner.

I've also marked some passages on the following two pages 1107, 1108. These refer over to another case which I've included in the case book, that is the Guerin case and I'll be mentioning in a moment that Guerin is the case that established that there was a feduciary duty or a trust-like duty in the Crown when dealing with Indian rights.

What the Sparrow case is saying here about the Guerin case is that:

"Recent judicial decisions...", and you'll see at the end of the paragraph that when they say that they're talking about their own decision in the Guerin,

"...have emphasized the responsibility of government to protect the rights of Indians arising from the special trust

relationship created by history, treaties and legislation."

And then the reference to Guerin. Now, Guerin was not a case involving very much history, it arose in the 50s and 60s, had to do with a golf course lease, it was not a case that had anything to do with treaties, when you look at it, no treaty in Guerin. It's not -- well, it did have something to do with interpreting legislation.

So here in Sparrow, in the passage that I've just read they're saying that those principles that we'll get to in Guerin, the principle that the Crown has this responsibility to protect the rights of Indians is not something that is extremely narrowly defined and has only to do with golf courses in Vancouver, which is what a lot of government lawyers and officials wanted to say after the Guerin case came out, this principle is a very, very broad one that applies across the board and has substance and reality.

At page 1108 at the bottom of the last full paragraph, again, the same kind of proposition is stated.

"The government has the responsibility to act in a feduciary capacity with respect to aboriginal peoples. The

relationship between the government and aboriginals is trust like rather than adversarial and contemporary recognition and affirmation of acknowledge aboriginal rights must be defined in light of this historic relationship."

And I ask you to compare that expression of what the law of Canada is with what you have had before you from the proponent which has largely described a process which is underway utterly and completely without regard to these rights.

The next page 1109 I've highlighted a brief passage which refers to the desirability of demanding that where a government regulation infringes rights, that there be some justification provided. And, once again, when the proponent is here with years of evidence and tonnes of paper describing a process which is going on seemingly without regard to the constitutional rights of people like my clients, there's got to be something wrong.

The next page 1110 I've highlighted one sentence.

"The government is required to bear the burden of justifying any legislation that has some negative effect on any

aboriginal right protected under Section 35."

Not only has the evidence of the proponent been completely silent, they haven't said: Well, it's silent for a reason. I suggest the best they could do is say: Well, it's not defined yet, so we'll just leave it for somebody else to worry about.

At page 1113 I've highlighted another passage. Here the court said, the government can't just come and say: Well, in the "public interest" we're going to ignore these rights. The court has said:

> "We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the limitation of the justification of a limitation on constitutional rights."

And I've marked a passage on the next page, 1114. This is the last full paragraph on the page dealing with honour of the Crown:

> "The honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government to

aboriginals must be first considered in determining whether the legislation or action in question can be justified."

And the final passage I would like you to look at to my mind at least is the most important one of all, this is at page 1119, and here the court is talking about the objective of requiring the Crown to justify its actions if it's taking away constitutional rights, it says:

"The objective...", this is the last sentence in the first full paragraph:

"The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously."

Not the subject of a press conference by a politician who wants the public to think that something is happening when it's not, but the subject of real and serious scrutiny and action by Crown officials. And it's my submission that the evidence before you is quite overwhelmingly that rights such as those of my client are simply not taken seriously, they're seen as public relations problems, they're seen as problems with the other clients of the proponent, they're seen as problems relating to the availability

of resource: Oh, no, here come the Indians we're going to have find some but we've already given it out to somebody else. They're seen as all kinds of problems of that type, but they're not taken seriously as rights.

A few words about the Guerin case, I've already mentioned it. Here the old theory that the Crown had no obligations at all is rejected and Professor Morse's evidence was that the Supreme Court of Canada was very clear in its disdain for the position taken by the Federal Department of Justice in the case because they walked in and they argued from beginning to end that the rights of Indians are unenforceable in court, they're purely moral and political obligations. In other words, we'll fulfill them if we can or if it's convenient, but you can't go to court to enforce them.

The courts said unequivocally, and for the first time really, that that is not the case, that Indian rights are not in some special category of unenforceable rights, Indian rights are as enforceable as anybody else's rights.

That old idea of unenforceability came from some old British empire cases where it was not convenient for the courts of England and the empire to

recognize that non-settler governments had rights, but finally - and it took until the 1980s in Canada - the Supreme Court of Canada said that's just nonsense, if it's a right it's a right and we don't have a special classification for Indian rights.

But here in this hearing there seems almost to be a revisiting of a version of that same old now defunct submission, when it almost seems that the proponent wants you to come to the conclusion that these are obligations that can't be countenanced by this tribunal. And my question is: Why not? Are we trying here to create again a special class of rights that are to be ignored?

Now, these rights that I'm talking about have so far found expression mainly in court and where aboriginal peoples have come to court and obtained injunctions, usually in regard to natural resource exploitation. I included some of the cases if you would care to look at them in the book.

One of them, for instance, Mears Island which is quite well known because it entered the public domain, but others that are much less well known but perhaps more revealing. The Saanich Marina one is particularly interesting, I would suggest, because you know the evidence before you about my clients and that

is their concern about fishing as a treaty right. You've heard my submission about the undeniable fact that forestry operations affect the fishery, and here in the Saanich case the courts stopped the construction of a marina because the Indians came forward and said: Look, we have fishing rights in that bay and these people want to build a great big marina. You cannot build that marina without affecting our treaty rights. And the court said: Yes, that's quite true. Now, it's apparent, 10 years ago it would have just, I think, been ignored. But the law now is much clearer, that these rights are to be taken seriously and they are to be applied.

I might suggest that the injunction cases which I have included in the case book show that if this Board elects not to deal with the treaty right issue at least in the narrow way that I'm asking you to, that you might end up in a situation where a court which is much less informed about the forest management reality - and I'm not here talking about anything arising directly out of this hearing, I'm talking about some grievance that somebody has like a marina being built, like some forest undertaking being carried out and coming to a direct collision - in that case, if it ever went to court, a court would be quite ill-equipped

to make a decision because of not having all of the information about forest management which you have.

The last part of my case book has to do with the question which - I'm not sure if it's an issue or not, but there was some suggestion earlier that it was an issue - whether the tribunal here can make orders that extend into the future as it were, future negotiations, future filings of documentation.

And I'm not going to belabour the issue. I've put several examples in of where this has been done by this Board and other boards and, not only that, if I understand the proponent's case correctly, I think they're asking in more than one place for things to be done later; that is, after the decision of the Board.

Now, the proponent is also saying - and I'm not really taking a position one way or the other on this one, I don't think it's necessary for my case - the proponent is also saying that once your decision is there that's the end of it, you're functus. That may be correct in law, it may not be, there may be parties who want to argue that issue.

But nevertheless there seems to me to be no shortage of examples of decisions by the Environmental Assessment Board and by other boards where the terms and conditions are such that things

have to continue to be done. So I simply can't see a problem there with the kind of compulsory negotiations that I'm asking you to order or with the filings. I'm saying in our proposed terms and conditions that the results of these negotiations be filed periodically with the Ministry of the Environment.

Just one final reference to the materials in the legal portion of my argument and, that is, I excerpted a draft provision that if the vote of last Monday had been yes would probably have ended up in the Constitution of Canada. As we all know now the vote was no and so we won't be seeing that in the Constitution of Canada, but that doesn't change my submission and my reason for putting it there.

Let's say the appropriate political representatives of the governments within Canada and the national government and all their advisors and so on got together and looked at how such things should be dealt with and although their conclusions will not be enshrined in the Constitution, at least in the form that they were proposed, their view, that is the view that arose out of all those discussions, I think is still very instructive and that view was that it was appropriate given the realities of things like treaty rights, it's appropriate that when they come before a

board or tribunal or a court that the tribunal first of all say: Have you tried to resolve this by way of negotiations, and only if the court or tribunal is satisfied that it hasn't worked, then the court or the tribunal is invited to go ahead and make a decision on it.

I am saying to you that that particular provision, if these amendments had been approved, would have been a very wise one and even though not approved still represents good common sense, and accords exactly and precisely with what I'm asking you to order.

Here in the case before you you know that there were no negotiations, the reason why you know that is because in Mr. Illing's report there is included at Tab A the letter dated December 12th, 1991 from Kathleen Murphy to me and it says, in the second paragraph:

> "Grand Council Treaty No. 3 and MNR did not negotiate native rights and allocation issues in the recent negotiations in the Timber EA. MNR continues to be of the view that these matters are not within the jurisdiction of the EA Board."

So you know as a matter of evidence that

there have not been negotiations. And my suggestion is that if negotiations are not part of the terms and conditions which you order, then in a way you're permitting the proponent to have utterly flouted your requirement during the course of the hearing that these negotiations take place and leaving the record as I have just read it to you, that no negotiations took place and without some kind of term or condition compelling those negotiations the proponent has, to put it colloquially, got away with it. And I'm asking you, don't let them get away with it.

I'd like to now just say a few words to try to put in common sense terms the proposed terms and conditions that I have attached to the written argument.

As you can see these go back a long way, these are dated January, 1990 and every now and then I've looked at them and said: Well, can these be updated, can these be streamlined, can these be made a little more comprehensible and I'm sure they could be, but I'm content to proceed with the format that was originally submitted.

Naturally there are always a number of ways to express things, but I never came to the conclusion that there was an obviously better way to do

this, so we're sticking with our original proposal.

The first item is not the central one, but we're saying that it would be appropriate for the approval to just be a year to year one. We're not insisting that that's necessary, but in light of all the outstanding issues, only one of which is the treaty rights issue, and the fact that the proponent's position has not been absolutely consistent from beginning to end, indeed one would be very surprised if it had been, and that there are matters for further information and so on being sought and will be obtained by the parties, all these factors make a relatively short approval period appropriate.

I'm not going to say anything more on that point because, as I said, this is not really the core of our submission.

The core comes in Section 2, and here we're saying there have to be compulsory negotiations and good faith negotiations between the proponent or whatever emanation of the Crown they create. You've heard my comments on that. I think the Crown is here and one cannot be heard to say: Well, we only have authority over three quarters of it so there has to be some other party before you.

Anyway, compulsory negotiations, plus

creation of a public record as to what has occurred in the course of those negotiations.

I've used the term environmental rights in the way this was drafted, and I believe that the proponent has some problem with that phrase. And so this was clarified in an interrogatory, I think I can find the reference, but the interrogatory simply said that the phrase, environmental rights, is a way of -- is an expression referring to an aspect of treaty and aboriginal rights. So that phrase being the one that's in the Constitution might better be the one to have been included here. And I'm simply saying I don't think anything turns one way or the other on it. If the term environmental rights is not a sufficiently familiar one, then it could well be substituted with the term treaty and aboriginal rights, which is the one that is in the Constitution.

And what would these negotiations deal with? I've mentioned before that you don't have to worry about exactly what they would deal with, making lists or anything, it's only the object that is important and if either of the parties think that the negotiations are not proceeding on a bonafide basis, then they would have their remedies.

The object is the object which is your

object, it's right from the Environmental Assessment Act, it's to identify appropriate actions to prevent, mitigate or remedy effects of the undertaking on the rights of the Indians under Treaty 3. So I have as much as possible in these draft terms tried to simply extract the words from the Environmental Assessment Act and, as I've mentioned, it might have been better if I actually extracted words from the Constitution as well.

So this is a proposed term or condition which is fashioned almost entirely on the basis of the statute law.

The third section of the draft terms and conditions has to do with compulsory, compulsory on the proponent negotiations also which must be bonafide. They're optional on the other party, that is, the individual Indian communities. Some of them may have no requirement for this type of negotiation and would simply opt not to participate, some would and at that point in time the proponent would be obligated to participate.

And, once again, the form of the draft is borrowed from the statute and rather than a reference to rights though here we're dealing with access and allocation. And the distinction, by the way, is that the overall Grand Council, this is the historical

entity that predates the Department of Indian Affairs and any Indian Act, so on and so forth, the Grand Council, this is the Ojibway entity that, as you heard in the evidence, gathered together on the Rainy River long before there were any number of white men in the territory, ran a government, and was only later sort of parsed into reserves and bands and so on by the Department of Indian Affairs. It's the Grand Council that negotiated the Treaty, it's the Grand Council that deals with treaty rights. But the individual communities have to deal with allocation and that's what Section 3 is about.

but allocation not in the sense of more than the next guy, allocation only in the sense of equal to similarly situated Indians. That would be the test.

If one of these negotiations ever went to court on the basis that it was not proceeding on good faith, then the court would look at whether this community is being bonafide offered equal access to what is being offered to similarly situated Indians, nothing special, just a device to overcome unfair obstacles, obstacles that don't belong there.

But if in this hypothetical situation of a community going to court and saying these

negotiations are not in good faith, we're not getting anywhere, we want you to enforce our rights, and the court looks at it and says: We can't see anything demonstrating why you've got any less access than similarly situated Indians, then the Indians who have taken that case to court are going to lose and that's the risk that my clients are very prepared to take, they don't want special privileges, they just want a level playing field and fair access.

The last item in the proposed terms and conditions is that 20 per cent of timber be reserved from licences. There's a reason for that, of course, and that is that something has to be available, and there is a Board interrogatory which I suggest illustrates the problem very clearly.

These are the replies to Board interrogatories delivered to the Board on June 4th, 1992, and I apologize that I don't have the exhibit number, but I think that by giving the number of the interrogatory it would be very easy to find because this was that huge batch that was delivered in June and it's No. 85. And the Board asked.

> "Do the provisions of an FMA constrain a company from giving Native peoples access to timber because the FMA holder

is are required to reduce its allowable cut by the same amount?"

And there's quite a complex answer to that but it comes right down in the last paragraph to this:

> "There are cases where the new demand could only be accommodated by making significant changes to existing obligations. This is true of all types of management units not just FMAs. If decisions of this type are made, consideration of such things as restitution and alternate employment mechanisms would likely be required."

In other words, this is the proponent saying, yet again, don't ask us to change our allocations because our existing clients are going to raise hell.

But if in your terms and conditions you require the proponent to include as a term of its licences or some types of licences that a certain proportion of the wood supply can be withdrawn for purposes of satisfying agreements, then those clients of the proponent would at least be on notice and there would not be this problem which I'm sure the proponent

would see as irresolvable, this problem of restitution and alternative employment mechanisms.

MADAM CHAIR: Mr. Colborne, we normally take our lunch break about this time. Is this a convenient place for you to stop?

MR. COLBORNE: This would be a convenient time for me to break, yes.

MADAM CHAIR: We normally return about 1:30.

MR. COLBORNE: That would be fine.

MADAM CHAIR: All right. We will see you back here at 1:30 then. Thank you.

MR. COLBORNE: Thank you.

---Luncheon recess taken at 12:00 p.m.

---On resuming at 1:30 p.m.

MADAM CHAIR: Good afternoon, Mr. Colborne. Would you like to continue with your final argument.

I had two questions actually that I wanted to put to you now with respect to item 4 in your terms and conditions.

Could you tell us the reasoning behind proposing that 20 per cent of future wood supply or timber rights be reserved or available to your clients. I have just that one question. Thank you.

MR. COLBORNE: Thank you, Madam Chair.

My answer to that query is very brief. It was pulled out of the air by me in consultation with my clients, but their wisdom together with mine comes nowhere near to what you have learned over the past four and a half years, so there is no magic whatsoever to that number.

It was an attempt to identify something reasonable, something that wouldn't be so threatening to the existing licence holders that they would perceive it as undermining the point of even being licensed, but yet being large enough to give notice that Indian rights questions are serious, but whether it ought better to have been 30 or 10, I don't know and I have no submissions.

I wanted to begin this afternoon by echoing some of the comments by Mr. Hunter this morning, perhaps the mirror image of what he was saying about sufficiency of evidence.

I take no issue with his submission that there is sufficient evidence that the terms and conditions that he is urging you to adopt are appropriate within the territory of his clients. I didn't want to imply in anything that I might have said on September 15th otherwise.

The mirror image that would be that I am submitting that you have in the evidence from my clients, that is the supplementary evidence package that was received and which none of the parties chose to cross-examine on, you have ample reasons why that type of term and condition should not apply in the Treaty 3 territory.

My submission would be that the supplementary witness statement contains the only comprehensive evidence you have on the topic.

The supplementary witness statement which I filed was not intended in any way to impact on or reflect whether that type of term or condition was suitable in the NAN territory, and my clients entirely respect and support the NAN desire to have that type of term and condition and are quite satisfied that there must be very good reasons why that is desirable.

As I have said, I have no hesitation in saying that there is ample evidence that those types of terms and conditions are suitable in that territory.

I want to outline very briefly, and I stress very briefly because you have seen this evidence recently, why it is that my client does not think that the package of proposals being put forward, I think it was called a native consultation process, by the

Proponent, why these are not desirable in the Treaty 3 territory.

Maybe I should begin by reminding you of Section 2 of the Act itself. You are entirely at liberty to make decisions as to parts of Ontario. That's one of the phrases in Section 2.

> "The purpose of this act is the betterment of the people of the whole or any part of Ontario..."

So I submit to you that there is no problem if you so chose to say that certain of your terms and conditions will apply in some areas and certain will apply in other areas, and I also suggest to you that the Proponent would not have any trouble administering that kind of division because if there is anything MNR has its maps and divisions.

They have got more lines on maps than probably anybody else and one more line saying these terms and conditions apply on one side of the line, these terms and conditions apply on the other side of the line, I am sure they could accommodate that if it was your decision.

Anyway, we are saying in our evidence that we are concerned that on our side of the line that that type of program would be seen as substituting for

rights recognition. I won't repeat anything more than that. I think you recognize the point that was made in some of the detail that was provided in the evidence.

The second thing, we are concerned that some of the information would be misused in the context of rights.

The third point, we are concerned that that type of information should not be prepared by MNR staff, that it is inappropriate in an era of Indian government recognition to have something called native interests, or whatever the terminology is, identified and dealt with by the administrative arm of a non-aboriginal government.

The fourth point we made is that we think it is inappropriate to have that type of matter that could have rights implications decided on a community-by-community basis. Certainly within the territory of my client, those overall rights issues are dealt with by the grand council, the traditional political organization, whereas the local, practical matters such as allocation are dealt with by the local communities and there is a great concern that a weak agreement made in one community will form the precedent that will be, in effect, imposed on other communities.

Therefore, that rights have done to be

dealt with, as my clients like to express it and the Government of Ontario now expresses it, on a government to government basis.

One part of the native package is this proposed native background information report and we are asking -- and that's not an optional one, to use that term. That's one that the Proponent is saying should be applied, should be prepared and used in all cases.

My request is that you not legitimize something of questionable value such as that, that that type of thing might well and wisely be prepared in certain circumstances by MNR internally, but you do not need to put the stamp of required approval on that as something that has to be done in all cases.

It is not necessary for you to do that. You are not asked here by the Proponent or anyone to list every little thing that MNR is going to do in every little case, and if there are appropriate cases where MNR employees should list the native values in an area, whatever that term may mean, then let them do it. They are not going to be prevented by any order that you make, but what we are suggesting for Treaty 3 territory is that it not be compulsory on MNR.

I question, what does this term native

mean anyway? What is a native value?

You know, you will look far and wide, but you won't even find the term native used anywhere outside of the Province of Ontario except in common parlance. I am not talking about conversational English, I am talking about legal English.

It is a term which appeared in recent years in a couple of Ontario statutes, but which my clients see as being part of Ontario's policy of trying to transform aboriginal people with special rights into just another ethnic group.

In the United States that process used to be called termination. What you do is you delete any reference to the legal demarcation between groups of people and you start identifying them only in terms of ethnic and cultural lines.

In the States what they did is they entered into negotiations, supposedly paid off the remaining treaty rights and said: Congratulations, you are now Americans. That was their termination policy. It didn't work.

My clients see even this term native, and you can go to Quebec, you can go to Manitoba, you can go anywhere across the county, you won't see that as a legal term. You won't see it in the Constitution of

Canada, you won't see it in any federal legislation. The federal government has constitutional authority over aboriginal people and Indians.

It is a term descriptive of ethnic and cultural groups and to that extent there is nothing wrong with it, but my clients simply don't want to join into a process that they see as part of a sequence by which their rights as Indians, as status Indians, as treaty Indians somehow disappear over time, and they become sort of an ethnic group that does pow wows.

They don't feel that they are that and do not want to participate in a process that goes in that direction.

Now, those considerations, you have no evidence at all that those considerations apply outside of Treaty 3 territory and they may well not. I am repeating myself here, but I saw the evidence from the Grand Chief saying we are satisfied with the commitments we have, and that's fine.

So maybe this type of process fits absolutely sufficiently into the situation they have, but you have the evidence from my clients saying we are not satisfied, we don't think we are getting anywhere with the Ministry of Natural Resources.

I want to turn briefly to a relatively

narrow legal point. I said a couple of times that my clients have rights unlike those of anybody else here, and I noticed a little activity on the other side of the room. So I think I will refer you to my basis for saying that just as a matter of law. I am referring to Section 10 of the Crown Timber Act.

We all know that that's the statutory basis for the allocation and licensing process and it says:

> "A licence does not confer on the licensee any right to the soil or freehold of the licensed area or to the exclusive possession thereof except as is in the opinion of the minister necessary for the cutting and removal of the timber thereon and the management of the licensed area and operations incidental thereto."

Now, I don't want to belabour that point, but I think it may be useful for you to have that provision before you when you give final consideration to the treaty right on the one hand and the rights such as they may be of other parties, such as timber licensees, on the other hand. They have the rights that are in their licences, but that's all.

I want to now address a few of what seemed to be the essential elements of the Proponent's position as against the one that I have been trying to address.

I understand the Proponent to be saying that allocation is a land use decision exercise and land use decisions are not part of timber management. You have had filed before you during the hearing a mountain of examples of District Land Use Guidelines and so on, this entire land use process.

I want to remind you, and I will give you a specific reference, that this land use planning process that is supposedly separate from the timber process is done by MNR. This isn't something done by somebody down the road or around the corner, and the reference there is Chapter 1.2 of the Proponent's argument at page 14 where it is confirmed, once again, and you heard this earlier on, but it is MNR's planning regime. They are the one who do strategic land use planning, district land use planning, resource management planning and so on.

So why do we draw a line between land use planning and timber management? Why exactly does it occur there?

My suggestion to you is that you are

being asked to accept that that's where the line ought to be drawn for reasons which don't have anything to do with what is before this Board. They have to do with the desire of the Proponent to keep allocation beyond review, as it were.

There may be very good reasons internally why they want it beyond review, and I will discuss that in moment, but the convenience and desires of the Proponent are not, of course, the same as the limits of the jurisdiction of this Board.

When the MNR planning process was being examined -- well, if I say that I think that Mr. Freidin will say that I am trying to give evidence, so I will just go forward a bit.

I believe that it is MNR's position, and Mr. Freidin will correct me if I am wrong, that that planning process is not just beyond review here, it is beyond review everywhere for the simple reason that it is not planning. They say: No, what we are doing here is producing guidelines.

So, say, our District Land Use Guidelines for such and such a district, and you have many examples of them in the evidence, these are not planning in the sense that that term is ordinarily used for purposes of deciding whether an environmental

assessment is required or not.

I believe that the MNR's position, and as I say Mr. Freidin will correct me in a couple of weeks if I am wrong, is that that is not subject to review because it is only the creation of guidelines. In fact, if you look at early versions of those plans they say plans. If you look at later versions they say guidelines and if you ask why they will say: Well, plans are subject to review, guidelines aren't, so we just changed the cover.

It is like changing the cover on the EA that is before you. The first cover said forest management, the cover that got to you said timber management, but changing the cover or saying: Well, it is convenient for us not to have this area of exercise reviewed is not the way that your jurisdiction gets defined. Your jurisdiction is defined in much more careful ways than that.

Licensing and allocation are political. That's what the Proponent seems to be saying. FMAs are issued by the cabinet, orders-in-council licences are issued by the minister. Licensing of timber never got into the 20th century. It is still the old pork barrel. There is no competitive bidding, there is no public process. It is purely political. Of course

they don't want you to look at that.

Now, my clients don't like that for obvious reasons. They think that this entire forest resource was expropriated from them for nothing. They never got a nickel for it and then the Government of Ontario turns around and uses it as a political pork barrel.

Now, that would be one of the reasons why my clients are so insistent that allocation has to be dealt with here. They feel that they are not just a public interest group coming in and saying: Oh, this is unfair or look what they are doing. They are coming in here as the people who not that long ago considered themselves to be and, in fact, were considered by the then Government of Canada at least to be the owners of this timber and they got nothing for it and now it is given away for purely political reasons and coming before a Board like this, they are told: Well, it is beyond the jurisdiction of the Board.

On that question of allocation, I am asking you to not depart from the decision that you rendered when we explored this issue in the latter part of 1989 and you rendered your decision of January 17th, 1990 saying that allocation is before the Board.

The last part of what I understand to be

an essential element of MNR's position as against the position I am trying to advance has to do with what has been referred to as other forums and you have heard a number of people say: Well, there are other forums.

I would like you to recall some of the responses to the Board interrogatories, and I referred to this a little earlier. This was the large batch that was received June 4th, 1992, literally hundreds in one group. I won't read from them, but I will just refer for the record to No. 81 and No. 82. 81 dealt with wild rice where the question was as to the status of the negotiations, and the answer: Nowhere.

Question 82 had to do with fishing rights negotiations and answer is: They are nowhere either.

There is a reference to some other territory, but I will stress again, I am only talking about Treaty 3 territory. There is nothing in there about Treaty 3, as indeed there couldn't be anything in there about Treaty 3 because there is nothing happening.

So what are these other forums? My understanding from the evidence, both the Proponent's original Panel 6, which I will refer to in a moment, and its reply evidence, which I will also refer to in a moment, is that these other forums are essentially

political processes that have been put in place and the one that's referred to here in Panel 6 from 1988 is a thing called The Declaration of Political Intent. That's at page 292 of the witness statement, sometimes called the DPI.

The one that was referred to more recently was in the reply evidence of the Proponent in witness statement 4. There there was reference to a document called The Statement of Political Relationship, short form SPR, and if I am not mistaken the reply evidence only referred to the SPR. It didn't actually produce for you a copy, but I think there can't be any objection to me reading to you from it which I propose to do now.

I want to say first that the DPI, as you will see if you look back through the evidence books, is something in sort of old English style script, just as the SPR is, as you will see. Probably the original is on parchment, I don't know.

We sometimes say that the SPI is the NDP's DPI. You need to be a real specialist to know what this kind of nonsense is about, but I will tell why I say it is nonsense.

Here is the what the DPI says, Section 1.03:

"The parties agree that this document is intended as an expression of goodwill and commitment to enter discussions. It is not intended to create, define or effect legal lights..." et cetera, et cetera.

So from a lawyer's point of view it is just a nice piece of paper in old English script.

Here is what the SPR says:

"This statement of political relationship expresses the political commitment of the First Nations in Ontario and is not intended to be a treaty or to create, redefine or prejudice rights or effect obligations..." et cetera, et cetera.

Once again, both of them have in them a denial that they create legal rights. So from the point of view of the political leaders who entered into these they are no doubt very important.

From the point of view of rights discussions in a final legal argument before a formal tribunal is nothing but political puff pieces, and if the Proponent is saying that these represent the other forums where serious issues and issues that are

impacted by timber management, like fishing and wild rice are to be dealt with, then they are referring to something which has no content at all, no legal content.

My clients are not obligated before a formal tribunal to be deflected into a process which has absolutely no teeth. That's what we are here for. We are asking for not a lot of teeth, but something to get a grip with.

So to sum up, I would say that on the treaty rights question you have heard all I have said about this being a constitutional right which, I submit, can't be ignored and we are asking that we have a lever via our proposed condition No. 2. Just a lever to require that the Proponent actually take these rights seriously.

Secondly, on the allocation question, we are saying that not only is that before you, but also that what we are asking for in our proposed condition 3 is a level playing field; nothing more, nothing less in terms of allocation.

Those, Madam Chair and Mr. Martel, are my submissions. I want to say since this is the conclusion of our case, and I say this on my own behalf as well as on behalf of my clients, that we wish you

well in your deliberations and very much look forward to your decision. Thank you.

MADAM CHAIR: Thank you, Mr. Colborne, and please extend our gratitude to your clients for taking part in this process and we have listened carefully to what they have had to say and we will be considering everything we have heard.

Thank you very much.

MR. COLBORNE: Thank you.

MADAM CHAIR: We will be returning Monday, November the 2nd at 9 a.m. to hear final argument from the Ontario Federation of Anglers & Hunters and the Northern Ontario Tourist Operators coalition on November 2nd and November 3.

---Whereupon the hearing was adjourned at 2:00 p.m., to be reconvened on Monday, November 2, 1992 commencing at 9:00 a.m.